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DUTY OF LAWYERS IN ELECTING A COMPETENT AND INDEPENDENT JUDICIARY.

The recent elections in many places in the country have given cause for lawyers to rejoice over the growing disposition of the electorate to ignore party labels in the selection of candidates for judicial positions.

The most notable of such results was the election of judicial candidates in St. Louis, where two judicial nominees on the Democratic ticket who had the indorsement of the local Bar Association overturned a Republican majority of sixty thousand and were elected by majorities of over three thousand.

The result is altogether attributable to the votes of independent women voters in the Republican party. This is clearly proven by the fact that two years ago when women did not have the vote the same situation was presented. Three judges were to be elected. The St. Louis Bar Association invited each party committee to agree to support nominees selected by Republican and Democratic lawyers meeting in separate conventions. The Republican City Committee declined the invitation and proceeded to nominate a ticket composed of very weak candidates. The Democratic lawyers, about 350 in number, met in convention and selected three competent and experienced practitioners of high and honorable standing at the Bar, which the Democratic City Committee had agreed in advance to accept. The Republican judicial ticket carried at that election, in which the Democratic judicial candidates ran only 2,000 votes ahead of their ticket. In the recent general election the same Democratic candidates were nominated without contest in their party. The Republicans again refused to accept the recommendations of the Republican lawyers of the Bar Association. These lawyers then appealed to the League of Women Voters, who organized a "Clean Court Campaign" and succeeded in electing the Democratic candidates in an election in which the successful candidates ran over thirty thousand votes ahead of their ticket.

The political leaders of both parties in St. Louis were astounded at the results of the judicial election and interviews of responsible leaders are to the effect that the recommendations of the local Bar Association will have to be respected in the future. Only lawyers who live in the larger cities can fully appreciate the importance of this victory. In many cities of the country judicial positions are being traded and sold politically by ward bosses who are able to work their will under the primary with more damaging effect than under the old convention system. The result has been in most cases a weak bench in all of our large cities. Good men refuse to enter a primary where no influences are present to counteract the influences of professional politicians who combine in support of certain candidates not always selected for their fitness for the office which they seek.

New York City, Chicago and St. Louis have taken the lead in overcoming the menace of the primary in judicial elections, and it now becomes the duty of every Bar Association and of all reputable lawyers in every judicial district in the country to follow that lead by entering every primary either with candidates of their own choosing, if possible, or by recommending the most capable of those who have voluntarily entered the primary. They must also organize the independent voters of their judicial district to concentrate the efforts of good citizens in favor of the candidates whom they have recommended. In doing this care must of course be taken to avoid all partisanship. In St. Louis the campaign against the Republican judicial candidates was organized by Republican lawyers.

The objection to the judicial primary is voiced in every meeting of local and state

Bar Associations. We admit that there is much truth and reason in this objection, but we are afraid that skillful demagogues and politicians will make it almost impossible to abolish the primary, although thousands of good citizens have declared that they are unable to select the best candidates for an office, such as judge, which requires certain technical qualifications, unless they have competent advice. Such men would be willing to abolish the judicial primary, at least, and to return to the plan of judicial conventions, but until that is done, and it may never be done, it is the duty of the Bar actively to enter every primary to advise the independent voter for whom to cast his vote. If either party refuses to accept the recommendation of the Bar it is clearly the duty of the association to enter the general election in behalf of the judicial ticket of that party which has accepted their recommendation. A few years spent in instructing the voters with respect to the advantage of accepting the judicial recommendations of the Bar will soon bring its reward in a better bench even in spite of the obstacles of a primary election. If the evil of a judicial primary is to remain the only successful antidote is the Bar primary. That is the ideal toward the attainment of which every lawyer is or should be looking. When each party committee is willing to accept the recommendations of the members of the Bar belonging to their party the problem of securing a competent judiciary is completely solved. For, under such circumstances good men can be drafted to serve as judges who would not voluntarily enter a general primary.

A few lawyers have been heard to object to this kind of political program on the part of their local Bar Association. These men are intense partisans. They do not understand that strict partisanship in the selection of judicial candidates constitutes unethical conduct under the Canons of Professional Ethics, the second canon of which declares that "it is the duty of the Bar to endeavor to prevent political considerations from outweighing judicial fitness in the selection of judges." This same section also makes it the duty of every lawyer, irrespective of his political affiliations to "protest earnestly and actively against the appointment or election of those who are unsuitable for the bench."

It is encouraging to be able to record the commendable activities of members of the bar in putting aside partisanship in their effort to secure good judges; it is also encouraging to observe the keen and sympathetic interest taken in the efforts of lawyers to improve the character of the Bench on the part of the women voters who in this respect alone can justify the effort put forth to give them the ballot.

NOTES OF IMPORTANT DECISIONS.

SUBSTANTIAL PERFORMANCE OF CONTRACTS.—Equity continues gradually to supplant the common law. It is a strange phenomena of Anglo-Saxon jurisprudence that there should have grown up side by side two distinct systems of law each maintaining its own vitality and radically influencing the other. But equity seems to be the stronger system. Before its older and broader system of justice based on the experience of the Ancient Civil law of Rome, the harsher and more barbarous principles of common law have had to yield. An instance of the dominating influence of Equity over the Common Law is seen in the recent case of Harrild v. Spokane School District, 192 Pac. 1, where the court extends the equitable principle of substantial performance to the case of contracts to manufacture goods, although heretofore the rule had been limited at law to building contracts.

In this case plaintiff agreed to manufacture a certain number of desks and tables according to certain specifications for $881.00. These specifications were not carried out in every detail but the trial court over the objection of the defendant instructed the jury that "if the respondent had honestly and faithfully tried to follow and comply with the plans and specifications, and that the tables and desks were substantially as required by the contract, then

the respondent would be entitled to maintain his action." In other words, the theory of the trial court was that a substantial compliance was all that the law required.

At the common law a strict performance of a contract was absolutely necessary. Any variation was fatal. In equity a substantial performance only was required. The justice of the equity rule was apparent but the common law courts refused to yield. Later, however, the injustice of the common law rule became so great when applied to building contracts that an exception was made in this class of contracts. The decision in the Harrild case applies the principle to contracts to manufacture a particular article according to specifications. In support of its decision the Washington Supreme Court said:

"It is argued that the strict compliance rule of the common law has been relaxed by the courts in building contracts because in those instances the construction is upon the land of another, and cannot be removed, and that it would be unjust, under those circumstances, to require one who has substantially, but not strictly, complied with the contract, to lose all of his work and material. But this same reason would equally apply to contracts for the manufacture of chattels for special use, for, while the manufacturer may carry away the article, it is of but little, if any, use or value to him. He will have lost his material and work in the one instance almost to the same extent as in the other. In equity the substantial compliance rule is applied to almost all contracts, and the party is permitted to recover as for a completed performance, less such damages as the other party may have been put to by reason of the matters not performed. 13 C. J. 691; 9 Cyc. 601. If justice requires the doctrine of substantial performance to be applied to building contracts, we see no good or logical reason why it should not, on the same grounds be made applicable to contracts of the character here involved."

The common law rule of strict and exact performance fails to take into account the imperfections of human nature. The equity rule is intended to relieve those who have faithfully and honestly endeavored to perform their contracts in all material and substantial particulars, so that their right to compensation may not be forfeited by reason of mere technical, inadvertent, or unimportant omissions or defects.

The unreasonableness of the common law rule is illustrated in another decision where the trial court took a carriage maker's case from the jury when it was disclosed in the evidence that he failed to make the carriage in a few very unimportant particulars exactly like the model he was asked to reconstruct. The Supreme Court of Wisconsin set aside the judgment and ordered a new trial on the ground that substantial performance was all that was required. Meincke v. Falk, 61 Wis. 623, 21 N. W. 785, 50 Am. Rep. 157. The Court declared that the common law set an impossible standard, saying that "it was impossible for any mechanic to make even two spokes precisely alike, so that a glass, or possibly the naked eye, cannot detect some slight difference between them."

There is clearly a tendency in the recent cases to adopt the equitable rule of substantial performance to all contracts. Newport v. Bridge Co., 90 Ky. 193, 13 S. W. 720, 8 L. R. A. 484; Peterson v. Mayer, 46 Minn. 468, 49 N. W. 245, 13 L. R. A. 72; Foeller v. Heintz, 137 Wis. 169, 118 N. W. 543, 24 L. R. A. (N. S.) 327. Some courts have made the mistake of supposing that substantial performance meant some other kind of performance than that called for in the contract. On the contrary, substantial performance means strict performance in all essentials necessary to accomplish the purposes for which the contract was made. An unimportant variation, however, that does not affect the purposes intended by the parties in making their contract ought not to be allowed to be set up to defeat the right of that party who has performed the contract as accurately as it was humanly possible to do.

THE DANGER OF NOT LIMITING PROOF OF CHARACTER TO PARTICULAR TRAITS RELEVANT TO THE ISSUE.—Attorneys will not be protected against irrelevant inquiries on cross-examination where they open the door to such inquiries by the unnecessary scope of their questions on examination in chief. This is important especially in proving the good character of a defendant in rape cases. In such cases good character should be limited to the trait of personal chastity. If the proof adduced is to the general good character of the defendant, the state may on cross-examination bring out facts derogatory to the defendant's character which have no connection whatever with the point at issue. State v. Kessler, (Iowa) 178 N. W. 513. In this case defendant, who was charged with rape, introduced evidence of his "general moral character." The state on cross-examination was permitted to show by such witnesses the defendants habits of intoxication and his cruelty to his wife which resulted in a divorce. The Court admits that the general inquiry as to character was too broad but since

defendant's counsel was an experienced attorney he must be presumed to have had some end in view in making the inquiry as wide as he did and could not object to the extent of the cross-examination. Justice Ladd, who delivered one of the many opinions, filed in the case said:

"Manifestly, the inquiries covered a broader field than the trait involved, and on appropriate objection the evidence must have been limited to his reputation with respect to character in the sexual relation, on the theory that he was not the kind of man likely to commit the offense charged. But no objection was interposed by the state, and counsel for the accused having opened the field of inquiry as to general reputation for morality, decency, and character, cross-examination covering this field was legitimate, and not beyond what the court in the exercise of a sound discretion might properly have permitted No one would pretend but that excessive drinking, carousing, bootlegging, having had a divorce obtained on the grounds of drunkenness and cruel and inhuman treatment, would have a direct bearing on his character for morality and decency. As he was represented by a lawyer of learning and ability, there is no occasion for injecting into the record a limitation on his questions, or a construction thereof, not appearing therein. It may well be assumed that for some reason, believed by him to be helpful to the defense, he chose not to limit his inquiries to the trait involved, and, not having done so, appellant is not in a situation to complain of the state's action in following him into the same field of inquiry he had opened. Such has always been the rule."

Sallinger J., who dissented, contended that a general inquiry as to a defendant's good character should by implication be construed to refer only to such traits as are relevant to the particular inquiry. We believe that this contention cannot be allowed without reflecting on the ability of attorneys to frame their questions with some degree of accuracy. The rule advocated by Judge Sallinger condones the too common fault of trial attorneys to be careless and slipshod in the matter of framing their questions to witnesses. It is just as easy to inquire as to the character of a witness for veracity, or for chastity as it is to inquire about his general moral character. And if a general good character is established for a defendant the state should have the right to test the knowledge of the witness as to the facts upon which his testimony is based. Basye v. State, 45 Neb. 261, 63 N. Y. 812; Annis v. People, 13 Mich. 511. This right of the state to test the knowledge of character witnesses is very important as false impressions are as easily conveyed to the jury through this kind of testimony as through any other.

THE RELATION BETWEEN LEGAL AID WORK AND THE ADMINISTRATION OF JUSTICE.*

Any discussion of the relationship between the work of the legal aid organizations and the administration of justice must be based upon a clear definition and a mutual understanding of the nature and function of the two institutions involved.

The essence of legal aid work is providing lawyers' services to the poor either freely or at a nominal charge. In some countries this is done through the courts, in others through the bar; in the United States it is done through the legal aid organizations. A legal aid organization is an agency, supported by public or private funds, which pays the salaries of a staff of lawyers and maintains an office which is exactly like any other law office of the humbler sort except that it has many more clients and sends out no bills. Between those two peculiar attributes there is undoubtedly a close causal connection.

The administration of justice signifies the entire system and plan which in every civilized society the state has created and controls for the purpose of securing justice to its citizens. By stating the component functional parts of our system and by appraising them from the point of view of our particular subject we can, I trust, at once dispel certain misunderstandings which have at times beclouded the existing situation in men's minds and clarify the real issue by focusing attention on those parts of the system which seem to embarrass and handicap the poor when they try to obtain justice.

Our system is based on the concept that justice should be administered by trained judges according to the settled principles of the substantive law. We all know that

*The subject of Legal Aid was one of the main subjects of discussion at the meeting of the American Bar Association in St. Louis last August. No paper was heard with more interest than that of Mr. Smith, of Boston, which is here given in full.—Editor.

American substantive law confers its rights and imposes its obligations without respect of persons; that in spirit and in substance it is democratic to the core. No lawyer, I am sure, will dissent from the statement that our judges constitute the most faithful, the most able, the most upright class of public servants in the country. Both the law itself and the judges who enforce that law in our several courts are impartial and, so far as their functions extend, afford equal justice to all men.

But laws are not self-enforcing, so that our system necessarily includes definite and prescribed methods for enforcing rights. These we speak of as the rules of pleading, practice, and procedure. And for the actual operation of this necessarily vast and complicated machinery of justice, our system contemplates and the state licenses a definite class of agents called lawyers.

It is not necessary here, as it is in discussing this subject with laymen, to elaborate the point that the lawyer is an integral part of our system of justice. We know that we are agents of the court and ministers of justice. Of the lawyer's function the Supreme Court of the United States in *ex parte* Garland[1] has said:

"It is believed that no civilized nation of modern times has been without a class of men intimately connected with the court, and with the administration of justice, called variously attorneys, counsellors, solicitors, proctors. They are as essential to the workings of the court as the clerks, sheriffs, and marshals, and perhaps as the judges themselves, since no instance is known of a court of law without a bar."

The lawyer prepares the facts, briefs the law, draws the pleadings and conducts the trial; his function is to make the machinery move. To borrow a homely illustration one may liken the administration of justice to an automobile in which the law is the engine, the judge is the steering and controlling apparatus, and the lawyer is the gasoline. We all know that if a car is to be started and kept in motion the motive power of gasoline is essential, and we should say that to give each of two men precisely the same type of car, allow gasoline to one and not to the other, and then expect a fair race, was preposterous.

Yet does not our existing system come perilously near to tolerating an analogous discrepancy within the administration of justice every day? Consider the situation of a woman who in 1914 in the city of Boston borrowed ten dollars from the Star Finance Co. to send to her mother so that she might not be evicted from her home. For a year the woman paid interest of 180 per cent. In 1916 the Boston Legal Aid Society secured from the legislature a law limiting the interest rate on small loans to 36 per cent per annum. The lender by a device contrary to the statute, continued to extort interest of 156 per cent per annum. It was the law of the commonwealth that if illegal interest were charged a court of equity could declare the loan void. There was the law, the equity court was in session, the judge was on the bench and the court officers were in attendance. All that was of no avail to her. The law could not extend its protection until a bill of complaint had been properly drawn and served, until the facts had been properly proved, and until a decree had been properly drawn. These things required a lawyer's services. But the woman did not have, and because of her condition could not earn, the necessary sum of money to pay even a small fee.

I think it is fair to generalize from this illustration, first because it is an actual case, and second because change all the facts, excepting the one fact of poverty, as much as you will, the result will remain the same. Destitution, which makes it impossible to retain a lawyer, is often due to the wrongful act of another; the substantive law authorizes the courts to give redress for that wrongful act; but to obtain that redress from the courts requires the skilled services of a lawyer. Here indeed is a vicious circle, and within it, as the records of the

(1) 4 Wall. 333, 384.

legal aid organizations testify, have been caught thousands of unpaid laborers, immigrants defrauded of their savings, injured workmen, and deserted wives.

We can see that this unhappy condition exists and why it exists because the instant we examine how our system of doing justice actually works out in the present-day world we find ourselves face to face with this dilemma. Lawyers are essential to the person who needs legal advice or court action; lawyers, like other human beings, must live and therefore must be paid for their services; but in every large city there are thousands of men, women and children who need legal advice or assistance in litigation and yet who are too poor to pay the reasonable fees which lawyers must charge.

This is the great maladjustment in the administration of justice as it is organized today. It makes access to the courts by the poorer people difficult and often impossible. It gives rise to the problem which we have met here to discuss and to solve to the best of our ability. The task is a challenge to us to make our system of justice approximate as closely as is humanly possible that ideal of freedom and equality of justice which our forefathers contemplated when they provided in our constitutions:

"Every subject of the Commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay, conformably to the laws."

When those words were written in 1780 the founders of our institutions realized perfectly clearly, just as we realize when we stop to think about it, that the effect of the American Revolution was to depose King George III and to set the law in his stead as the sovereign power in the new democracy "to the end," as the classic phrase states it, "that ours shall be a government of laws and not of men."

All rights, even the inalienable rights to life, liberty, and the pursuit of happiness were made to depend in last resort on the protection afforded by law through enforcement in the courts. To make certain that enforcement the state has erected its machinery of justice and this machinery depends for the performance of certain essential functions on agents of the court called lawyers. All this has been done in good faith and in itself is entirely proper. What seems to me improper is that having created this system we have failed to make it possible for all men to obtain the services of those agents. Our failure has been unintentional and unconscious because we have not realized the results which unavoidably flow from such a situation. If men, because of poverty, cannot secure counsel the machinery of justice becomes unworkable, and that in turn means that rights are lost and wrongs go unredressed. When persons are thus debarred from their day in court they are as effectively stripped of their only protection as if they had been outlawed.

No democracy can tolerate such a condition in its most essential institution nor can it safely incur the dangerous sense of injustice, bitterness and unrest which it inevitably engenders. The nation looks to us, as the official representatives of law, for guidance.

How then can we obviate this difficulty caused by the inability of the poor to employ counsel?

Experience has demonstrated only two methods. The first, which is limited in scope but is extremely effective so far as it goes, consists of simplifying the machinery so much that lawyers' services are unnecessary. In some few fields the lawyer is today required solely because of antiquated and cumbersome procedure. For instance, there is no good reason why a court summons issued in Massachusetts and in some other states should read: "We command

you to appear before the Justice of our Court on Saturday, the twenty-eighth day of August, A.D., 1920. Fail not of appearance at your peril" so that it is necessary to employ counsel to explain that the plain English words do not mean what they say but in law mean that you are not required to appear before the judge at all but must file your answer with the clerk on or before the succeeding Wednesday. Mr. Justice Bond of the Supreme Court of Maryland has pointed out that when these words originally appeared in the summons they were true, because in the early days the defendant was required to appear in person and only thereafter could he answer or plead by an attorney. For generations the practice has been changed but the outgrown phraseology has remained. A little modernizing will do away with the artificial need of employing counsel to explain useless anachronisms.

Simplification of machinery has proved eminently successful when applied to small contract cases, such as grocery bills, claims for wages, and miscellaneous debt. The small claims courts, which now exist in seven or eight different cities, have demonstrated that in the average small claim the law and the facts are so simple that technical rules of pleading and procedure can safely be dispensed with and when that has been done lawyers' services are not necessary. No law prohibits the appearance of counsel before the small claims session of the Cleveland Municipal Court but the fact is that lawyers almost never appear.

The quickest way to explain what this simplified machinery is and how it operates is to tell you the story of a case I heard one morning in the Cleveland small claims court.

A was unable to collect from B his bill for four dollars for pressing the suit of Mrs. B. He went to the clerk of the small claims session, who, finding that the matter could not be directly adjusted over the telephone, had A sign a simple statement which corresponded to copying the bill onto the court docket. On payment of fifty cents, which covered all costs, a summons was made out and deposited by the bailiff in the mail chute. This required B to appear on the third following day and on that day A and B appeared.

Instead of a formal calling of the case, when it was reached the judge merely asked Mr. A and Mr. B to step to the bench. A few direct questions made it clear that Mr. A had done the work, delivered the suit, and had not been paid. Mr. B was then asked if the work was imperfect and why the bill was unpaid. He responded that when the suit was delivered the man had insulted his wife and had concluded with the flat statement: "I pay no bill to a man who insults my wife." The judge talked that over with Mr. A and it appeared that A did not deliver the suit, but that his boy did and the boy, he admitted, "was inclined to be a little fresh." The judge thereupon suggested that Mr. A go into the anteroom, telephone Mrs. B and apologize for anything that might have been said. This A did at once and on his return a moment later was given judgment for the four dollars. B took the money out of his pocket and paid A. They shook hands. After saying, "Thank you, judge," they departed together in peace.

What a contrast to this simple, direct, quick, inexpensive procedure is our traditional and customary procedure. And how different are the results the two produce. A dramatic critic once made the observation that in most tragedies, if at the end of the first act the author would permit his characters to have a few frank words with each other, the misunderstanding which was the basis of the plot would vanish and the play would abruptly come to a happy ending.

In all fairness I ask whether the little A versus B episode which was turned into a comedy by the Cleveland small claims court would not be converted into a tragedy by the formal contentious procedure enforced

in most courts. In my own state, Massachusetts, A might have forgone his just dues because the costs and fees would be too much and thereafter he would have hated B and the law as well. Or, if B had retained me, I should have pleaded a general denial and payment. That would have started the plot in earnest. Then, either I should have defaulted just before the trial, or I would have attempted a defense of "poor workmanship" and would have brought in all of Mrs. B's neighbors to prove it. A, of necessity, would appear armed with his lawyer and a company of tailors. Thus, where there was no real issue, I should have created one. If, during the trial, anything about a possible insult to Mrs. B were mentioned, both I and my brother for the plaintiff would have been on our feet with objections which would have been sustained. At that point the real solution of the case would have been lost forever and we should have labored on to the bitter end, a perfect living example of an absolute economic waste. Barring some technical mischance, A would get his judgment because our judges are seldom fooled by specious defenses, and a bill of costs would be added on. A and B would be enemies ever after and neither would thank the judge, who to them personifies the law. A would not net his four dollars, he would have lost a customer, and also a day's work. B would have had his fighting blood stirred by the trial, would therefore be angry at his defeat, he would be quite a bit out of pocket, and he would have contempt for a court which compelled him to pay for having his wife insulted.

The small claims court represents what can be accomplished through intelligent readjustment of the *machinery* of justice without in any way departing from those fundamentals which we consider essential to justice. In the small claims court justice is administered by trained judges according to the principles of the substantive law just as faithfully as in any court in the land. But by adjusting its procedure to the needs of the little cases it has succeeded in obviating the expense of counsel which heretofore has always handicapped the poor.

As many of the cases of the poor are small claims, their position before the law will be vastly improved if we can secure the establishment of small claims sessions in every municipal court.

Two other experiments have been made along somewhat analogous lines. One is the domestic relations court with its auxiliary administrative machinery of the probation staff. The other is that new type of legal institution which we call an administrative tribunal. Within a decade we have seen the law governing industrial accidents radically altered and the cases of injured workmen taken out of the courts and entrusted to the industrial accident commissions. We gave them much greater power to control their procedures than we have given the courts, and they have succeeded by standardizing forms, simplifying procedure, and by affording a certain amount of assistance from clerks and inspectors in establishing a form of machinery which operates to bring the vast proportion of cases within their jurisdiction to an almost automatic settlement.

From the point of view of the poor this has been a great step forward. Whereas under the old law and procedure an injured workman was obliged either to accept the amount offered by a casualty company adjuster or employ counsel on a contingent fee basis and wage a protracted and expensive fight in the courts, today, in nine cases out of ten, he receives the exact amount of compensation awarded by law promptly and without expense. Freedom and equality of justice are thereby actually attained.

It was originally intended that the compensation acts would do away with the need for lawyers altogether. That plan has failed as it was bound to fail. When a case gives rise to some disputed question of fact or law the fundamental and genuine necessity of the lawyer's function instantly ap-

pears. The commission cannot perform the inconsistent responsibilities of judge and advocate. This clearly marks the limit beyond which our first solution of obviating the expense of counsel through simplification of machinery is not effective.

Small claims, domestic relations, and industrial accidents are but small sections of the whole vast realm of the law which in all its manifold departments reaches out and regulates individual conduct, business conduct, contractual relations, social relations, property, and countless other subjects too numerous to be mentioned. For the conduct of cases arising in all this area the services of lawyers are essential. By hypothesis, the administration of justice cannot function impartially unless both parties have adequate representation. No easy solution through simplified procedure is sufficient.

The only solution which can overcome the difficulty caused by the inability of the poor to bear the expense of lawyers' services is, therefore, to supply them with lawyers' services gratuitously. In other words, as we cannot eliminate the need for lawyers without overturning the entire structure of our legal institutions the only possible alternative is to eliminate the expense.

The responsibility of supplying the services of lawyers to the poor has been undertaken not by the courts themselves and not by the bar acting in its organized capacity but by independent agencies which we call legal aid organizations. To this generalization there are minor exceptions and further it should be said that many individual judges and lawyers were pioneers in creating these agencies but the important fact remains that the legal aid organizations came into being independently of the administration of justice and have grown up as though they were distinct from and unrelated to our existing judicial institutions.

The first legal aid society was started in New York in 1876 and ten years later two similar agencies were founded in Chicago. For years the idea was not understood by either the bar or the public, it did not spread, and the existing organizations were maintained with much difficulty. When the nineteenth century drew to its close there were still only these three societies and their clients in 1899 numbered only 10,425. In the first decade of the new century, however, a steady expansion began, and by 1910 fourteen societies had been established in the East. During the next four years, 1910-1914, their number doubled to twenty-eight, the chief expansion being in the cities of the Middle West. Until the outbreak of the war the movement continued to spread, it extended to the Pacific Coast and into the Southwest, so that by 1917 forty-one organizations were in existence.

When one considers their recent origin the amount of work already accomplished by the legal aid organizations is remarkable. They have provided lawyers for one and one-half million persons; they have collected for their clients cash sums aggregating over four million dollars and for the conduct of this work they have expended nearly two million dollars. They are maintaining a corps of one hundred and seventy-five attorneys; and each year over 100,000 persons appeal to them for legal assistance.

This multitude of plain and humble people considers the legal aid organizations as the most essential part of the administration of justice. Although we know that their estimate is disproportionate we can clearly see that legal aid organizations came into being to fill a gap in our legal institutions and that today they are performing an essential service which is an integral part of any comprehensive and complete system of providing equal justice to all: equal justice to our fellow citizens, who may be poor or ignorant, and to the strangers within our gates, so that the humblest among us may invoke the protection of the law through proper proceedings in the courts for any invasion of his rights, by whomsoever attempted.

The realization that there exists this close relationship between legal aid work and the administration of justice has come but slowly. For a long time we were misled by the fact that legal aid organizations were supported by private philanthropy into thinking of them as just one more form of charity; we failed to see through the form to the substance and to appreciate that there was involved the great distinction between giving such things as fuel and clothing which is charity and giving justice which is the supreme obligation of government. This attitude was perfectly natural; even the men most closely identified with the work did not grasp the full truth.

Then in 1910 Kansas City created a legal aid organization as a department of government, appropriated public funds for its support and established a precedent which has since been followed in eight other cities. Guided by these object lessons our thought has developed until now we are beginning to understand that legal aid work has a definite and close relationship to the administration of justice. Because of that relationship, legal aid work becomes a matter of direct concern to all members of the bar and especially to us as members of this great Association.

Our honored President speaking last April in Chicago of the purposes and activities of the Association among other things said:

"The American Bar Association is not a club, nor a political party, but an organization made up of volunteer members of the bar (meeting to) exchange views as to how we can benefit, not ourselves, but our country, how we can solve these problems pressing upon us, how we can answer the cry of the poor and the downtrodden for justice, and how we can say 'we will sell, delay, or deny justice to no man as was said in Magna Charta.'"

I have faith that we can solve that problem; I believe we have it in our power to answer that cry. We understand the nature of the problem confronting us as fully as it is ever permitted us to understand any problem of human life. We know of two instrumentalities which attack the existing difficulty at its roots and which, if wisely developed, will go far towards remedying it completely. Basing our judgment not on theory but on the already accumulated fund of experience we can confidently be assured that by aiding in the extension of small claims courts and similar agencies throughout the country, by enabling the legal aid organizations to attain their maximum potential strength, and by guiding the whole legal aid movement towards its ultimate goal of incorporation into our system of administering justice we shall be rendering an invaluable national service, for we shall be promoting the sane and orderly reform of our legal institutions in the direction which is at this time of the most critical importance.

Our opportunity is as splendid as the responsibility is great. There has been an awakening of the public conscience. The course of events is already beginning to shape itself. The Massachusetts Judicature Commission has recommended and the legislature has enacted a law giving the simplified machinery of the small claims court state-wide application for the adjudication of small causes. The Pennsylvania Constitutional Commission has adopted and will submit an amendment to the Constitution of Pennsylvania giving the Supreme Court power not merely to regulate practice and procedure but also to control costs, provide for the assignment of counsel, and to "regulate the activities of any public or private agency rendering legal aid."

Beginnings of this sort, encouraging as they are, can attain their full promise only through the sympathetic support and cooperation of the bar. Our leadership is needed.

We have every reason to face this task with optimism and high courage. If we will take command of the moral forces which are now stirring throughout the nation, we shall find public opinion ready to fight staunchly at our side. Let us assume

that leadership by declaring here and now that henceforth within the field of law the mighty power of the organized American bar stands pledged to champion the rights of the poor, the weak, and the defenceless.

REGINALD HEBER SMITH.

Boston, Mass.

GIFTS—EXECUTORY PROMISE.

In re CONGER'S ESTATE.

In re FOWLES.

Surrogate's Court, Albany County. September 22, 1920.

184 N. Y. Supp. 74.

An executory promise, without consideration and intended to operate as a gift after death, cannot be enforced.

STALEY, S. The above claim, having been rejected by the executor, is brought on for determination in the proceeding for final settlement in this estate. The claim arises out of the following instrument, executed by the decedent in his lifetime:

Centenary Estate Pledge.

For the Board of Home Missions and Church Extension and for the Board of Foreign Missions of the Methodist Episcopal Church.

(Manly W. Conger) March 20, 1919.

In consideration of my interest in Christian Missions, and on condition that the above-named boards secure other subscriptions for this cause, and for value received, I hereby promise and agree to pay to the Board of Home Missions and Church Extension and the Board of Foreign Missions of the Methodist Episcopal Church, at No. 150 Fifth avenue, New York City, the sum of

One thousand.....dollars ($1000.00)

which shall become due one day after my death, payable out of my estate, interest at the rate of ——— per annum from date.

Dayton E. McClain Witness Name Manly W. Conger

William H. Edwards Witness Address Clarksville Alb Cy

Conference Troy

District Albany

Charge Clarksville

Make all checks payable to George M. Fowles, Treasurer, 150 Fifth avenue, New York.

Mail subscriptions to F. T. Keeney, 207 Fayette Park Building, Syracuse, N. Y.

The claim is resisted by the executor upon the grounds that the note on which the claim is based was signed and delivered by the decedent without consideration; that it was an executory promise without consideration, and intended to operate as a gift after the death of the decedent; and upon the ground that the payee of the note is not an incorporated body authorized to receive or enforce its payment.

From the evidence it appears that the Board of Home Missions and Church Extension and the Board of Foreign Missions of the Methodist Episcopal Church, through a committee known as the Joint Centenary Committee, undertook the task of raising $105,000,000 to carry on the work of the church. One-half of this amount, or the amount raised, is to be used in the United States and the other half in foreign fields. The committee proposed three forms of giving. One form was called the straight Centenary pledge of so much a year for five years; another form, the annuity, in which the donors turned over to the church a sum of money, getting the interest on it as long as they lived, and at their death it becomes the property of the board; and the third, the form here in question, was known as the estate pledged form, in which the donors pledge a definite amount, to be payable out of their estates after their death.

The evidence establishes that the payees of the note are the two boards, and that these boards are incorporated, and are therefore authorized to enforce payment.

It is well settled that an executory promise, without consideration and intended to operate as a gift after death, cannot be enforced. Holmes v. Roper, 141 N. Y. 64, 36 N. E. 180.

An instrument by which the signer agrees to pay another a certain sum at a specified time after death, if supported by a sufficient consideration, is a valid and enforceable obligation. Worth v. Case, 42 N. Y. 362, at p. 366; Carnwright v. Gray, 127 N. Y. 92, 27 N. E. 835, 12 L. R. A. 845, 24 Am. St. Rep. 424; Keuka College v. Ray, 167 N. Y. 96, 60 N. E. 325. In the latter case Judge Gray, writing the opinion, said:

"The question of the enforceability of agreements of the nature of the one in question has been frequently the subject of judicial opinion, and we are cited to many cases in the briefs of counsel; but I think the discussion is reduced simply to this: Whether the agreement which is sought to be enforced, and which is a voluntary promise on the part of the defendant, expressly or impliedly either imposes upon the promisee some obligation,

which is assumed, or requests of the promisee the performance of services, which are to be performed upon the strength of the promise. If those conditions are met, then, within the rule of law, there is a consideration which will suffice to uphold the agreement, or the promise. * * * The doctrine, however, may be regarded as well established that, if money is promised to be paid upon the condition that the promisee will do some act, or perform certain services, then the latter, upon performance of the condition, may compel payment. Nor need a request to the promisee to perform the services be expressed in the instrument; it may be implied."

The contention in this case resolves itself into a question of fact as to whether there was sufficient consideration recognized by law to sustain the promise of the decedent. The instrument in question expressly recites that the promise and agreement to pay these boards the sum of $1,000 is made "in consideration and on condition that the above-named boards secure other subscriptions for this cause."

The obligation on the part of Conger to pay was based upon the promise of the claimant to obtain other subscriptions. The facts are, as established by the testimony, that other subscriptions were obtained through the agents of these boards, subsequent to the subscription of Conger; that the work of soliciting funds for this movement was continuing at the time of the trial; and that the expense of this work was being paid for by these boards. The promise made has been fulfilled by these boards, and it is sufficient to establish a consideration, and to sustain the obligation on the part of Conger to carry out the agreement which he made.

The claim, for these reasons, is allowed in full, with $25 costs.

Decree may be entered accordingly.

NOTE—*Gift of Sealed Notes as Valid Against Maker's Estate.*—Conceding the general rule to be as decided in the instant case, it is inquired here what would be the status of a note under seal given by one as a *donatio causa mortis.*

In Mack's Appeal, 68 Pa. 631, it was said by Sharswood J. that: "Sealed notes can in no sense be regarded as testamentary, for revocability is of the essence of a testament. * * * A man may give a present bond to pay a sum of money at his death, and a delivery of it to the obligee renders it perfect as a present obligation though payable at a subsequent whether a fixed or uncertain period to be afterwards ascertained and made certain. It is strictly *debitum in presenti solvendum in futuro,* and is as irrevocable as any other obligation under seal, which in law imports consideration."

But in Maryland it was said as to notes under seal that: "A seal imports a consideration; that is to say, it supplies its place and makes a contract as valid as if value had been actually paid and received. In suit at law a judgment might have been obtained on these notes. But in equity remedial justice is administered on very different principles. * * * It does not look with favor on a bare naked right founded on the technicalities of the law. Hence it has always been held that it will not enforce an executory contract which is merely voluntary, and not founded on a valuable consideration really and actually existent." Selby v. Case, 87 Md. 459, 39 Atl. 1041.

In 1 Story's Eq. Jur. Sec. 793d it was said as to an executory contract that "the Court will not execute a voluntary contract, but will withhold assistance from a volunteer, whether he seeks to have the benefit of a contract or a *covenant* or a settlement."

In English decision it was stated by Lord Eldon that: "The distinction is settled that in the case of a contract merely voluntary, this court will do nothing. But if it does not rest in voluntary agreement, but an actual trust is created, the court does take jurisdiction." To the same effect spoke Lord Chancellor Nottingham in Jeffreys v. Jeffreys, 1 Craig and Phil. 138, 141.

The theory upon which the ruling was made in Mack's Appeal, *supra,* was recognized in a much later case where it was said: "A seal imports a consideration, but there is here a good consideration in the natural love and affection of a father to his children and his obligation to protect them." Ross Appeal, 127 Pa. 4. But this does not seem to make the conveyance other than voluntary and executory, but what is said implies that the Pennsylvania court is somewhat uncertain on the fact of a seal being of itself sufficient in a Court of Equity.

It seems to this writer that contracts under, and those not under, seal are very greatly the same in all essential particulars, and whatever of distinction appears is to be strictly confined to statutory terms. In the cases I have cited fraud is not shielded and neither ought inquiry into the nature of contracts be abridged. Seal is the relic of an age largely inapplicable to present day conditions, and when it was used it was more for identification of signers than any other purpose.

C.

CORRESPONDENCE.

DUTY OF LEGISLATURE PRIMARILY TO DECIDE THE CONSTITUTIONALITY OF A PROPOSED ENACTMENT.

Editor, Central Law Journal:

Your editorial, "Is It the Duty of the Legislature or of the Courts Primarily to Decide the Constitutionality of a Proposed Enactment?" in your Journal of October 15, 1920, page 277, and that of Mr. Thomas W. Shelton (91 Cent. L. J. 187), were written by both, probably, without practical experience as members of legislative bodies.

Four years of my life have been spent in the Senate of the State of Alabama and two

years in the House of Representatives of the Congress of the United States. I write as a result of observations made by me as member of the State Senate and National House of Representatives.

As a rule, all state legislative bodies and the Congress of the United States contain on their committees lawyers as good as the best of the average judges, either in the national courts or the state courts. As a rule, all legislative bodies accept the conclusions of their committees who report bills for passage. As a rule, all bills reported for passage have been carefully considered by one or more good lawyers, both in the state legislatures and in the Congress of the United States.

Were the law the exact science it is claimed to be so thoughtlessly by many, even lawyers, it would be impossible for any unconstitutional legislation to pass either a state legislature or the national Congress. But law is not an exact science. To be an exact science would require that any combination of words forming a sentence that had an intelligent meaning to it, should have *one meaning and no other*. If that were so, all opinions of Appellate Courts would be nothing but mathematical demonstrations. But, we all know, that into every sentence is read a meaning, varying according to the mind which reads it. Very few of the members of the Appellate Courts, whether national or state, have been prepared for their positions by a liberal education. Very few of them reason according to the rules of logic. The vast majority are only rule of thumb reasoners. Hence, their opinions are full of violations of the rules of logic, false premises, fallacies, sophistries, indulged in for the purpose of reaching a certain conclusion, which they already had in their minds when they entered into the consideration of the case and which is the goal towards which they travel in their arguments. Every lawyer knows, that a good lawyer can make a good brief on both sides of any question. If that lawyer is in a position in which what he says has the force and effect of law, and what is more, *is the law*, the probabilities are, he is going to reach that goal.

Now, the foregoing facts are well known to every member of a legislative body and every member of a legislative body knows, that, no matter what may be the opinion of the good lawyers who are members of the body to which he belongs, he also knows that their opinion counts for nothing, if it runs counter to the opinion of one man or a handful of men, vested with the power, which our constitutions vest in our Appellate Courts of nullifying any legislation, by declaring it to be unconstitutional. In all legislative bodies, between the members, it is "give and take," and no one could prudently oppose a measure, otherwise good, simply because, in his individual opinion, the measure was unconstitutional. He knows, that, whatever might be his individual opinion, the measure is constitutional or unconstitutional, not according to his view but as a majority of some Appellate Court may declare it to be. Therefore, a prudent member of a legislative body never opposes any measure, good on its face, because he thinks it is unconstitutional. Whether it is unconstitutional or not, is beyond his ken or the ken of any mortal, who does not sit in judgment upon that measure as an Appellate Court or as one of a majority of the Court.

Yours respectfully,

FREDERICK G. BROMBERG.

Mobile, Ala.

[Our esteemed correspondent, Mr. Bromberg, has appeared very frequently in these columns and has always been very frank and out-spoken in his praise and blame. We are always glad to publish the hard things that are said about us as well as the good things. We are ready to admit that we never had actual legislative experience but this, it seems to us, does not disqualify one from passing on the duties of a member of a legislature and at any rate it could have nothing whatever to do with the soundness of our views about the result of their failure to examine a law from the standpoint of its constitutionality as well as from the standpoint of its expediency. The obligation, however, resting on the legislature and the people to interest themselves more vitally in the matter of upholding their own Constitution does not relieve the courts of their equally solemn function to enforce the supreme law of the land.—Ed.]

LIABILITY OF "AUTOMOBILE" ITSELF FOR DAMAGES WHICH IT CAUSES.

October 25, 1920.

Editor, Central Law Journal:

The note by "C," to Venturini v. Carlin (Ala. 86 So. 156), states:

"This branch of the law (automobile law) is going through the mill toward the evolving of a new principle in agency under the state's police power, based on the dangerous character of the automobile as an instrumentality on the public highway." See C. L. J., October 22, 1920, page 310.

Assuming the decision of the Supreme Court of Alabama, in the principal case, excusing the owner of the automobile, to be sound, how would it do to hold the automobile, supposing there was enough of it left after the collision, to make it worth while? Why not apply, to automobiles, the rule of Admiralty Law, which holds the vessel causing a collision liable for the damages caused by the collision? The proposition that the principles of Admiralty Law shall

be applied to, and that admiralty courts shall have jurisdiction of cases arising out of navigation of the air, is being considered by the American Bar Association. There is good reason for applying these principles on land, as well as on sea and in the air, in this day of swift and dangerous means of locomotion. If you lend your Packard to a reckless and irresponsible friend, and with it he runs down my Ford and me, if you are to go free, and pursuit of your friend is useless, why shouldn't I be allowed to hold your Packard?

Yours very truly,

T. J. O'DONNELL.

Denver, Colo.

CLASS DOMINATION IN AMERICA.

Editor, Central Law Journal:

I write to commend your article in the current issue entitled "Injunctions Against Carriers for Refusal to Accept Freight Delivered on Non-Union Trucks."

I fear, however, that you have had little experience with Union domination when you use the one phrase in this article, as follows:

"Opened the eyes of many to a power which, while it has hitherto been in the main wisely used,"

It has been just as unwisely used for many years wherever the leadership and the numbers were present. I do not see how you could have overlooked the instances where milk has been refused even to hospitals, where towns have been left in darkness, and other instances too numerous to mention, and that prior to the war. It is true that the Labor Union took advantage of the war to increase its power, and the manifestations of power became more and more evident, especially since President Wilson, aided by four labor union leaders who held their stop watches on Congress, enforced the passage of the so-called Eight-Hour Law, a law which the Union leaders knew, and which the members of Congress knew, and the President who signed it knew was not a law to establish an eight-hour day, but it was a law to enable them to get two and two and a half days' pay for one day's work, and ever since that law was enacted all over the United States train crews, who formerly put their trains in in seven hours, are now taking fourteen and sixteen, and receiving extra pay for all overtime above eight hours. No wonder the Government lost a million dollars a day in running the railroads!

In our neighboring city of Tacoma a young man refused to do the work of turning a crank on a picture machine as directed, and was discharged. His union demanded his re-instatement. It was refused and the Union members all quit. Then they took it up with the Union in Seattle and in four theaters they all quit in sympathy with the Tacoma Union. They have been out now some four months and the Central Labor Council, which controls all the Unions, has passed a resolution imposing a fine of not less than five dollars on any member of a Labor Union that is seen in any one of those theaters, and the boycott has extended to transportation and to many entirely innocent people.

It is time that the law magazines, lawyers and courts meet this issue squarely and settle for all time the question of whether or not law shall be obeyed and whether or not the rights of the citizen shall be protected.

Sincerely yours,

JOHN W. ROBERTS.

Seattle, Wash.

HUMOR OF THE LAW.

The new member of Congress was enjoying the hospitality of one of the most amiable and attractive women of the capitol, and was doing admirably until she led him into trouble with the remark: "I am afraid you find Washington rather dull at present. There is very little excitement, excepting what you find in the way of duty at the capitol." "It is rather monotonous," he asserted. "No doubt you have an occasional mauvais quart d'heure?" "No," he replied; and then leaning over confidentially: "I haven't tasted anything stronger than tea in a year."

"A cat sits on my fence every night and makes the night hideous with his infernal row. Now, I don't want to have any bother with my neighbor but this nuisance has gone far enough, and I want you to advise me what to do."

The young lawyer looked as solemn as an owl and answered not a word.

"I have a right to shoot that cat, haven't I?"

"I would hardly say that," replied the young lawyer. "The cat does not belong to you, as I understand."

"No, but the fence does."

"Ah!" exclaimed the light of the law, "then I think you have a perfect right to tear down the fence."—*London Ideas.*

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Adverse Possession**—Public Use. — Land dedicated to public use cannot be acquired by adverse possession.—Humboldt County v. Van Duzer, Cal., 192 Pac. 192.

2. **Bankruptcy**—Discharge.—Notwithstanding a bankrupt's discharge, where the estate has never been technically closed, the bankruptcy court has summary jurisdiction to compel the bankrupt, by order, to surrender to the trustee property belonging to the estate, the existence of which was canceled or had not come to the knowledge of the trustee before discharge was granted.—Levy v. Schorr, U. S. C. C. A., 266 Fed. 207.

3.——Proof of Claim.—The statement under oath of a claim against a bankrupt makes a prima facie case, and if it conforms to the requirements of the statute and is not objected to proves the claim, and if objected to it still is prima facie proof of the validity of the claim.—In re Welborne, U. S. D. C., 266 Fed. 385.

4.——Summary Jurisdiction.—A court of bankruptcy held without summary jurisdiction to determine that the property and capital stock of a second corporation was the property of the bankrupt corporation, and to order them turned over to its trustee over objection of the corporation and its stockholders.—Looschen Land & Building Co. v. Milson, U. S. C. C. A., 266 Fed. 359.

5. **Banks and Banking**—Business Reputation.—In an action for damages to plaintiff's business reputation by defendant's breach of contract to honor his checks, injury to plaintiff's business reputation is special damage, which must be pleaded specially.—Spiegel v. Public Nat. Bank of New York, N. Y., 184 N. Y. S. 1.

6. **Bills and Notes**—Indorser.—An indorser of a note may waive notice of dishonor before or after the maturity of the instrument, so that a letter tending to show that indorser agreed to collect the note is competent evidence on the issue of waiver of notice.—Washington Horse Exch. Co. v. Bonner, N. C. 103 S. E. 907.

7.——Joint and Several Obligors.—The payee and holder of a joint and several note signed by C and A, with knowledge that A signed note to secure or as collateral for another note signed by C, can only recover from A the amount remaining due on the note of C for which the joint note was collateral.—Texas Bank & Trust Co. of El Paso, Tex., v. Cavin, N. M., 192 Pac. 365.

8. **Brokers**—Exclusive Agency.—Owner's contract, giving brokers the "exclusive sale" of described property within specified period, held not to have authorized brokers to enter into a contract on behalf of owner, being mere authority to find a purchaser.—Lewis v. Jones, S. D., 178 N. W. 1001.

9. **Carriers of Goods**—Notice to Carriers.—That tobacco flues, shipped uncovered, and used only for tobacco curing, were shipped in a locality where tobacco is generally grown, and in the midst of the curing season, warrants finding of notice to carrier of their purpose and immediate need, so as to authorize recovery of special damage from spoiling of tobacco for delay in transportation and delivery.—Thompson v. American Ry. Express Co., N. C., 103 S. E. 898.

10. **Carriers of Passengers**—Proximate Cause. Where injuries to a passenger in one of two colliding automobiles were proximately caused by the negligence of the operators of both automobiles, each operator is liable to the pasenger for the full damage sustained by him, so that where appellant was negligently driving on the left side of the road it was no defense to his liability that the codefendant, against whom no verdict was rendered, was operating at negligent speed.—Blackwell v. American Film Co., Cal., 192 Pac. 189.

11.——Res Ipsa Loquitur.—The happening of an injurious accident is in passenger cases prima facie evidence of negligence on the part of the carrier, and, the passenger being in the exercise of due care, the burden rests on the carrier to show its whole duty was performed and that the injury was unavoidable by human foresight.—Pennsylvania Co. v. Clark, U. S. C. C. A., 266 Fed. 182.

12. **Collision**—Rules of Navigation.—When a vessel disregards a rule of navigation, she has the burden of showing that her disobedience did not contribute to the injury which followed.—The No. 25, U. S. C. C. A., 266 Fed. 331.

13. **Contracts** — Inconsistency. — Where two provisions of a contract standing alone are inconsistent, the contract will be construed by determining the general intent of the parties from the contract as a whole.—De La Cuesta v. Armstrong Holdings Co., Cal., 192 Pac. 135.

14.——Option.—Where a certain number of cartons was ordered at prices quoted, with the statement that "we have the privilege of in-

creasing the amount of the original order at any time during the period the original contract is in effect," the provision as to the privilege of increasing the amount of the original order was unilateral, and the purchaser could not recover damages by reason of the seller's refusal to deliver more than the original number ordered.—Schalk Chemical Co. v. R. W. Pridham Co., Cal., 192 Pac. 195.

15.——Substantial Performance. — Where a building contractor has substantially performed all the essential parts of the contract in good faith, he can recover the contract price, less compensation to the owner for damage resulting from trivial defects and imperfections, due to inadvertence, especially when the owner has received the benefit of the work done.—Joseph Musto Sons-Keenan Co. v. Pacific States Corporation, Cal., 192 Pac. 138.

16.——Third Party.—A contract, the basis of which is the violation by one of the parties of a contract with a third party, will not be enforced by a court as between the parties.—Roberts v. Criss, U. S. C. C. A., 266 Fed. 296.

17. **Conversion**—Lapsed Legacy.—Where a bequest of the proceeds of the sale of real estate had lapsed by the death of the legatee, the husband of testatrix, the sons of testatrix by a former husband, who were her only children, are entitled to the proceeds of the sale, either as heirs at law or next of kin.—Stenneck v. Kolb, N. J., 111 Atl. 277.

18. **Corporations**—Action.—A corporation may maintain an action to recover damages for libel or slander against it as a corporate entity, injuriously affecting its trade or business.—Coal Land Development Co. v. Chidester, W. Va., 103 S. E. 921.

19. **Criminal Law**—Admission.—Declaration of prosecuting witness in a burglary case as to the identity of an article alleged to have been stolen was admissible as a quasi admission of the defendant, where made in his presence, without a denial on his part at the time, and in corroboration of the witness.—State v. Willoughby, N. C., 103 S. E. 903.

20.——Suspending Judgment.—A judge of the superior court, after suspending judgment for defendant's good behavior on plea of guilty for retailing spirituous liquor, could impose sentence on such judgment, where defendant violated the conditions of the suspension by engaging in the unlawful sale of liquor.—State v. Hoggard, N. C., 103 S. E. 891.

21. **Customs and Usages** — Imputability. — Where a custom is known to the parties, or its existence is so universal and so prevailing that knowledge will be imputed, the parties will be presumed to have contracted in reference to it, unless excluded by the express term of the agreement between them.—Cohoon v. Harrell, N. C., 103 S. E. 906.

22. **Deeds—Burden of Proof.** — There is no presumption that a deed by a parent conveying property to a child is void, and the burden is on one attacking such deed to prove fraud and undue influence.—Pleasants v. Hanson, Cal., 192 Pac. 183.

23.——Grantor.—A deed, signed and acknowledged by the persons named therein as grantors and by others as well, is not the deed of those not named as grantors, and their interest does not pass.—Roberts v. Abbott, Cal., 192 Pac. 345.

24. **Easements**—Implication. — An easement cannot pass by implication merely on the ground of convenience.—Goudie v. Fisher, N. H., 111 Atl. 282.

25.——Title.—The right to an easement over a strip of land 30 feet wide carried with it merely the right to use and maintain the roadway, and not the absolute title to all the timber and other material on the roadway.—Barton v. Sutton, Ky., 224 S. W. 366.

26. **Embezzlement**—Bailee.—Where one comes lawfully into posession of property, and afterwards and while it is in his possession forms and carries out the purpose of appropriating it to his own use, the crime thus committed is embezzlement.—Tredwell v. United States, U. S. C. C. A., 266 Fed. 350.

27.——Defined.—The word "embezzle" has a technical significance, and conveys the idea of wrongful appropriation of the property of another by one intrusted with it, or who has possession of it under some trust duty or office, and the word of itself implies a fraudulent and unlawful intention on the part of the person charged (citing Words and Phrases, Embezzle—Embezzlement.)—United States v. Davenport, U. S. D. C., 266 Fed. 425.

28. **Eminent Domain**—Implication. — A grant of power of eminent domain, which is one of the attributes of sovereignty, will never pass by implication, and, when the power is granted, its extent is limited to the terms and the clear implication of statute.—City of Los Angeles v. Koyer, Cal., 192 Pac. 301.

29. **Equity**—Copyright.—A decree in a prior suit to enjoin production of a play on the ground of it being an infringement of a copyright held a "consent decree;" that is, one entered on consent of the parties as to what the decision should be, constituting a mere agreement of the parties under sanction of the court.—Hodgson v. Vroom, U. S. C. C. A., 266 Fed. 267.

30.——Supplemental Bill.—Granting or refusing leave to file a supplemental bill is usually in the discretion of the trial court, and where its order refusing such leave is not an adjudication of the merits, but leaves it open to complainant to obtain such adjudication by a new bill, it will not be reversed by the appellate court.—Rosemary Mfg. Co. v. Halifax Cotton Mills, Inc., U. S. C. C. A., 266 Fed. 363.

31. **Estoppel**—Misrepresentation. — Generally a misrepresentation of law will not work an estoppel.—Robbins v. Law, Cal., 192 Pac. 118.

32.——United States.—The United States is not estopped by acts of its officers or agents, and as a general rule their laches or negligence is no defense to a suit by the government to enforce a public right or protect a public interest.—Chanslor-Canfield Midway Oil Co. et al. v. United States, U. S. C. C. A., 266 Fed. 145.

33. **Evidence** — Declaration of Decedent. — Where it is sought to reach the estate of a decedent and not to establish a right through him to property of others, declarations of the decedent that certain persons were his heirs are alone sufficient to show the relationship.—Nolan v. Barnes, Ill., 128 N. E. 293.

34.——Good Faith.—There is a presumption of good faith and performance of duty on the part of an agent, but such presumptions do not obtain where it is shown that the agent acted as an individual, and not in his fiduciary capacity.—Reynolds v. Reynolds, Tex., 224 S. W. 382.

35. **Fraud**—Pleading and Practice.—To be a good pleading of fraud, the representations claimed to be false must be stated, and the truth must be averred, and it must appear that the party making them knew that they were false, and intended to perpetrate a fraud, and that they were relied on.—Riddle v. Isaacs, Ore., 192 Pac. 398.

36. **Frauds, Statute of**—Past Performance.—Taking possession and making improvements on land under an oral contract of purchase are entirely sufficient to remove the bar of the statute in an action on the contract.—Kepner v. Stillman, Mo., 224 S. W. 321.

37.——Real Property.—A right of way given for a pipe line by the government to one having ownership of a water right upon public lands, is real property, and a sale thereof must be evidenced by a written instrument.—Simmons v. Inyo Cerro Gordo Mining & Power Co., Cal., 192 Pac. 144.

38. **Fraudulent Conveyances** — Insolvency.—When it appears that an execution has been issued and returned nulla bona, there is a prima facie showing of insolvency on the part of the judgment debtor for purposes of suit attacking an alleged fraudulent conveyance to his wife.—Ohio Electric Car Co. v. Duffet, Cal., 192 Pac. 298.

39. **Injunction**—Adequate Remedy.—A defendant in an action at law in a federal court, relying upon res judicata, has a complete and adequate remedy by pleading it as a defense, and cannot maintain a suit in equity, based thereon, to enjoin the law action.—Plews v. Burrage, U. S. C. C. A., 266 Fed. 347.

40. **Insurance**—Scope of Agency.—An agent employed to procure insurance has no power to consent to a cancellation, or accept notice thereof; his authority terminating on delivery of the policy.—Lauman v. Concordia Fire Ins. Co. of Milwaukee, Wis., Cal., 192 Pac. 128.

41. **Judgment**—Primary Liability.—If a landowner, creating a nuisance consisting of a cellarway extending into the sidewalk, was held not liable for injuries to a pedestrian, in an action against him therefor, the city is not liable, and cannot be sued therefor.—Betor v. City of Albany, N. Y., 184 N. Y. S. 44.

42. **Landlord and Tenant**—Lease.—A lease is a contract between the lessor and lessee, vesting in the latter a right to the possession of the land for a term of years. It becomes an estate when it takes effect in possession.—Howard v. Manning, Okla., 192 Pac. 358.

43. **Larceny**—Circumstantial Evidence.—Circumstantial evidence, which merely established defendant's opportunity to steal a purse, and the possibility, though not probability, of his placing it where it was found, held insufficient to sustain a conviction for grand larceny.—People v. Selva, Cal., 192 Pac. 330.

44. **Limitation of Actions**—Stipulation.—Parties to a contract may stipulate therein for a period of limitation shorter than that fixed by statute, which is not contrary to public policy, provided the period fixed is not so unreasonable as to show undue advantage.—Beeson v. Schloss, Cal., 192 Pac. 292.

45. **Master and Servant**—Burden of Proof. — Where a servant, having the burden of proving nonassumption of risk, did not directly deny knowledge of the danger, and there was evidence from which the jury could infer that he did not assume the risk, it was error to instruct the jury that they could not find assumption of risk.—Bjork v. U. S. Bobbin & Shuttle Co., N. H., 111 Atl. 284.

46.——Incompetent Fellow Servant.—In an action for injury to a servant, where incompetency of a fellow servant is charged, the burden of proving this, and that defendant knew, or with ordinary care should have known, of such incompetency, rests upon plaintiff, and a single act of negligence by one who was experienced and generally competent is insufficient.—James Stewart & Co. v. Newby, U. S. C. C. A., 266 Fed. 287.

47.——Negligence of Master.—If the carrier is negligent in furnishing a defective car to the shipper, and the shipper in turn is negligent in furnishing it to his employe to be loaded, the carrier and shipper are both liable for resulting injury to the employe, but as between carrier and shipper the liability of the carrier is primary.—Waldron v. Director General of Railroads, U. S. C. C. A., 266 Fed. 196.

48.——Safe Place.—That, in placing cars not then in use on standing tracks in a freight yard, spaces were sometimes accidentally left between them, held not to impose on the railroad company the duty of safeguarding employes, who voluntarily and without necessity used such openings as passageways.—Hines, Director General of Railroads, v. Jasko, U. S. C. C. A., 266 Fed. 336.

49.——Workmen's Compensation Act. — Under the Workmen's Compensation Act, the employment is not limited to the exact moment when the workman reaches his place of work, or to the exact moment when he ceases work, and it necessarily includes a reasonable time and space before and after ceasing actual employment, having in mind all of the circumstances.—Wabash Ry. Co. v. Industrial Commission, Ill., 128 N. E. 290.

50. **Mines and Minerals**—Option. — Mere tenancy in common or joint ownership of an option on mining property does not make the owners partners.—Hand v. Allen, Ill., 128 N. E. 305.

51. **Mortgages**—Burden of Proof. — The presumption of law is in favor of regularity in execution of a power of sale under mortgage, and the burden was on defendants to show a claimed failure to advertise properly.—Berry v. Boomer, N. C., 103 S. E. 914.

52.——Indebtedness.—Where there is an indebtedness or liability between the parties, and this debt is left subsisting, not being satisfied by a conveyance absolute on its face, but the grantor is still regarded as owing and bound to pay it at some future time, the conveyance amounts to a mortgage.—Totten v. Totten, Ill., 128 N. E. 295.

53.——Inurement.—A promise by the mortgagor to the mortgagee that he would apply the proceeds of the mortgage to payment for labor and material used for the erection of a house on the mortgaged premises does not inure to the benefit of the holder of a trust deed subject to the mortgage who was not in privity to the promise.—Silvins v. Mordoff, Cal., 192 Pac. 289.

54.——Lien.—One receiving a mortgage while building was being repaired is charged with notice of materialman's right to lien.—Redman v. Murray W. Sales Co., U. S. C. C. A., 266 Fed. 272.

55.——Sale Under Power.—Where mortgaged property had been sold under the power of sale

contained in the mortgage, but the sale was d clared void because the purchaser was acting for the mortgagee, the mortgagee can again sell the property under the power without an ord of the court.—Harrison v. Daw, N. C., 103 S. E. 900.

56. **Municipal Corporations**—Ordinance. — Ordinance requiring landlord to file with city clerk copy of notice to tenant demanding possession or increasing rent is unreasonable, as imposing an additional burden on landlords, and for no good reason, but a mere pretense that it is to aid the city clerk in dividing the city into election districts.—Stell v. Mayor and Aldermen of Jersey City, N. J., 111 Atl. 274.

57. **Negligence** — Imputability. — The negligence of the driver of an automobile in the management of his machine at a railroad crossing is not imputed to his passenger.—Collins v. Hustis, N. H., 111 Atl. 286.

58. **New Trial**—Reduction of Verdict.—A verdict cannot be reduced on the ground of excessive damages, unless a new trial can properly be granted on that ground.—Van Fleet v. O'Neil, Nev., 192 Pac. 384.

59. **Nuisance**—Warning. — Continued storing or leaving of nitroglycerine, without warning signal or protection, on a public road in a populous community, and constituting a menace to life and property, constitutes the misdemeanor of common nuisance, the common law as to which still obtains in the state.—Kentucky Glycerine Co. v. Commonwealth, Ky., 224 S. W. 360.

60. **Parent and Child.**—Emancipation.—Emancipation of a child works a severance of the filial relation as completely as if the child were of age.—Iroquois Iron Co. v. Industrial Commission, Ill., 128 N. E. 289,

61. **Parties**—Necessary. — The test of indispensability of party is not whether the decree is bound to injuriously affect the rights of the absent party. It is enough that such absence may leave the controversy in such a situation that the final determination may be inconsistent with equity and good conscience.—Davis v. Henry, U. S. C. C. A., 266 Fed. 261.

62. **Patents**—Assignment.—Where a corporation had sold and assigned a patent, but the assignment had not been recorded, the assignee, as equitable owner, held entitled to show that a subsequent assignment by its president after its dissolution was void.—Burgess Battery Co. v. Solar Light Co., U. S. C. C. A., 266 Fed. 368.

63.——Imitation. — Where a patentee contributes a new construction, whereby an imitation is made, it cannot be presumed that the purpose of the imitation is to deceive, and indeed an imitation may be of great utility.—Scott & Williams v. Aristo Hosiery Co., U. S. D. C., 266 Fed. 382.

64. **Principal and Agent**—Gift.—A power of attorney, for the maker's use and benefit, to bargain, sell, and convey the maker's land upon such terms and conditions as the holder might see fit, did not authorize the holder to convey land for a nominal consideration of $2; that being, in effect, a gift.—Huntsman v. Huntsman, Utah, 192 Pac. 368.

65.——Sale.—Where an agent's contract for the sale of fertilizer entitled him to a commission for actual delivery, the agent was not entitled to a commission on orders procured by him, where the purchasers thereafter failed to take the quantity they first ordered, because of delay in deliveries not due to causes beyond the principal's control.—Swift & Co. v. New Bern Produce Co., N. C., 103 S. E. 889.

66. **Principal and Surety**—Assumption of Defense.—That a casualty insurance company, which assumed the defense of an action against insured for death of an employe, refused a settlement of the claim for less than the sum finally recovered, held not to debar it from enforcing the judgment, which it had paid as surety in supersedeas bond against insured for the excess over the amount of its policy.—Big Vein Pocahontas Co. v. Maryland Casualty Co., U. S. C. C. A., 266 Fed. 363.

67. **Railroads**—Franchise.—The right to construct, maintain, and operate a railroad, and receive toll or fare for the transportation of freight and passengers, is a franchise which can be exercised only by legislative authority.—Chicago, R. I & P. Ry. Co. v. Taylor, Okla., 192 Pac. 349.

68.——Look and Listen.—Negligence in failing to look for an approaching train when about to cross a railway track is not, as a matter of law, in every case, the proximate or contributing cause of an injury received when attempting to so cross a railway track.—Texas & N. O. Ry. Co. v. Wagner, Tex., 224 S. W. 377.

69. **Release**—Intention.—A release, like other contractual obligations, has for its primary rule of construction the intention of parties, which must govern; but this intention must be ascertained from the words used in the instrument, and not from matters dehors the writing.—In re Atwater, U. S. C. C. A., 266 Fed. 278.

70. **Sales**—Conditional Sale.—A sale contract of a car by which the title was to remain in the seller until completely paid for, is one of conditional sale, not passing title.—Conner v. Borland-Grannis Co., Ill., 128 N. E. 317.

71.——Counterclaim.—Though a contract for the sale of a fruit crop was not formally rescinded, the failure of the buyer to make payment on delivery, which was demanded in accordance with the terms of the contract, warranted the seller in refusing to make further deliveries unless payment was made, and in attempting, as he did by counterclaim, to recover for fruit already delivered.—United Canneries Co. of California v. Seelye, Cal., 192 Pac. 341.

72.——Damages.—On the failure of the seller to deliver goods having a market value, the measure of damages is the difference between the contract price and the market value at the time and place where they should have been delivered.—Cherry v. L. J. Upton & Co., N. C., 103 S. E. 912.

73.——Loss in Transitu.—The general rule in mercantile law is that the risk follows the title, and where property is lost in transitu the party in whom title rests must stand the loss.—Penniman v. Winder, N. C., 103 S. E. 908.

74.——Payment.—A contract to assure a seller of payment for all he is to deliver is not fulfilled by assurance of payment for part only.—Morrill v. McInnes, U. S. D. C., 266 Fed. 441.

75. **Shipping** — Chartered Vessel. — Where a chartered vessel was damaged by an excepted peril before time for delivery under the charter, but not so as to prevent repair, it is the duty of the owner to repair the vessel and deliver it to the charterer within a reasonable time, though the time for delivery has already expired.—Freiberg Lumber Co. v. Rosalie Mahoney S. S. Corporation, Del., 111 Atl. 281.

76.——Resulting Damage.—A barge, which to save herself from destruction after she had been loosened from her moorings by a large ice floe, placed a line on a string of barges fastened to an adjoining pier, as a result of which the line from those barges to the pier parted, is liable for the resulting damage.—The Walter Green, U. S. C. C. A., 266 Fed. 269.

77. **Trade Marks and Trade Names**—Registration.—The fundamental inquiry in determining the registrability of a trade-mark is whether the suggested trade-mark, word, or device, with the environment proposed for it, conveys by its primary meaning something which others may employ with equal truth and equal right for the same purpose.—Hercules Powder Co. v. Newton, U. S. C. C. A., 266 Fed. 169.

78. **Trusts**—Commission.—A trustee will be allowed a commission on the principal of the estate, in addition to his commission on the income, only for unusual services rendered by him, which are not compensated by his commissions on the income.—Caldwell v. Hopkins, D. C., 265 Fed. 972.

79.——Spendthrift.—A "spendthrift trust" is one which provides a fund for the benefit of another, and secures it against his own improvidence, placing it beyond the reach of his creditors.—Carter v. Brownell, Conn., 111 Atl. 182.

80. **Wills**—Intention.—Intention of testator which controls the construction of a will is that which is manifest from the language of the will as viewed, in the case of ambiguity, in the light of the situation of the testator.—Davis v. Brown, Wash., 191 Pac. 1098.